an accused person is before the court and the court has jurisdiction to try the particular offence it should not concern itself with how the accused has been brought before the court. I would urge magistrates to bear in mind the case of *Kuppusamy* v. *Public Prosecutor* (3) where Murray-Aynsley J. said:—

"I think it is clear that the earliest stage at which a magistrate can acquit an accused person is after hearing all the evidence for the prosecution."

Upon preliminary objections such as this which only affect procedure, for a magistrate without hearing any evidence to acquit and discharge is going too far.

I leave it to the learned deputy public prosecutor whether he wishes to proceed upon the charge that has been framed. That was for failing to have an attendant at the rear of the vehicle for the purpose of signalling overtaking traffic — one of the conditions of the haulage permit. One sees many heavy vehicles on the road today so constructed or otherwise covered up with tarpaulin that no attendant could be so posted at the rear of the vehicle and the charge would seem to be somewhat hard to justify.

Appeal allowed.

Solicitors: *Khoo & Yeap.*

CHAN EN CHENG v. PUBLIC PROSECUTOR

[A.Cr.J. (Ismail Khan J.) November 25, 1966]

[Malacca — Criminal Appeal No. 11 of 1966]

Criminal Law and Procedure — Joint trial — Persons charged with retaining stolen property at different times and at different places — Properties stolen at same time — Whether joint trial of the accused proper — Criminal Procedure Code (Cap. 21), ss. 173 & 179.

The appellant and another accused were charged with offences of retaining stolen property, each of them at a different time and at a different place. The properties were however the subject of the same theft and the accused persons were jointly tried and convicted. On appeal it was contended that the joint trial of the accused was illegal.

Held: the joint trial in the case was illegal and the convictions must be set aside.

Cases referred to:—

(1) *Nadasen* v. *Public Prosecutor* [1952] M.L.J. xxiii.

(2) *Manikam & Anor.* v. *Public Prosecutor* [1947] M.L.J. 90.

(3) *R.* v. *Assim* [1966] 2 All E.R. 881.

(4) *Shakur* v. *Emperor* A.I.R. 1935 Oudh. 475.

(5) *Mst. Guljania* v. *Emperor* A.I.R. 1928 Patna 38.

(6) *Abdul Majid* v. *Emperor* (1906), I.L.R. 33 Cal. 1256.

MAGISTRATE'S CRIMINAL APPEAL.

Edgar Joseph for the appellant.

Abu Talib bin Othman (Deputy Public Prosecutor) for the respondent.

Cur. Adv Vult.

Ismail Khan J.: The appellant and one Bong Foo (hereinafter called the other accused) were originally charged with having committed robbery on 7th November, 1965, at about 3.10 a.m. at 127, Jalan Temenggong, Malacca. At the close of the case for the prosecution, the charge was amended as against the appellant, to read as follows:—

"That you on 7.11.65 at about 5 a.m. at Jalan Tranquerah, Malacca, in the State of Malacca, dishonestly retained stolen property, to wit, a transistor radiophonogram belonging to Bong Kwee Lian having reason to believe the same to be stolen property and that you thereby committed an offence punishable under section 411 of the Penal Code."

and as against the other accused, Bong Foo, to read:—

"That you on 7.11.65 at about 3.10 a.m. at the backlane between Bunga Raya Road and Wolferstan Road, Malacca in the State of Malacca, dishonestly retained stolen property, to wit, a Parker fountain pen and a Tudor wristwatch belonging to Ng Kim Swee having reason to believe the same to be stolen property and you thereby committed an offence punishable under section 411 of the Penal Code."

The case for the prosecution was that on 7th November, 1965, the complainant was awakened in his bedroom at about 3 a.m. by some noise coming from an adjoining room. He got up and went to the hall. There in the dim light from the bedroom he saw two persons ransacking his safe. He shouted. One of the intruders stabbed him in the groin. The two then escaped. He found his wristwatch (P2) and a fountain pen (P3) missing, and also a radiophonogram (P5) which belonged to his wife. On the same day at 3.10 a.m. a detective stopped the other accused, Bong Foo, at a backlane behind the Capitol Theatre and recovered P2 and P3 from his trouser pocket and a screw driver tucked between his trousers and left hip. Later at 5 a.m. a police corporal on duty at Jalan Tranquerah stopped the appellant. He was carrying a bag and in the bag was P5. The appellant said he bought P5 two months before. The other accused said he bought P2 and P3 from a stranger that night.

Both the appellant and the other accused were convicted and sentenced to nine months' imprisonment each. Only the appellant has appealed against his conviction and sentence.

The main ground of appeal is directed against the joint trial of the appellant and the other accused. It was contended for the appellant that as the two were distinct offences in respect

of time and place, his joint trial with the other accused was in contravention of section 173 of the Criminal Procedure Code (S.S. Cap. 21). In support of the contention the following cases were cited:—

(a) *Nadasen* v. *Public Prosecutor* [1];

(b) *Manikam & Anor.* v. *Public Prosecutor.*[2]

The learned deputy public prosecutor submitted that the justification for the joinder of the charges lies in the fact that though the receiving of the properties was at different times, the properties were stolen at the same time. No authority was cited for this proposition. The English case of *R.* v. *Assim* [3] appears to have some bearing on this point. Briefly, the facts of the case are that one Wilkinson, Longton and two others went to a club where the appellant was employed as a receptionist, and one Cemal as a doorman. They had some drinks and then Longton and one other of the four left and went outside. As a result of a dispute the appellant slashed Wilkinson with a knife. Longton seeing this tried to re-enter the club. A struggle took place in the course of which Cemal assaulted him. The appellant was charged and tried together with his co-accused Cemal on an indictment containing two counts:—

Count 1 — against the appellant alone charged him with wounding one Wilkinson on 29.10.65;

Count 2 — charged Cemal alone on the same day with assaulting one Longton.

It was held that the joinder was proper. Sachs J. said at page 887:—

"As a general rule it is, of course, no more proper to have tried by the same jury several offenders on charges of committing individual offences that have nothing to do with each other, than it is to try before the same jury offences committed by the same person that have nothing to do with each other. Where, however, the matters which constitute the individual offences of the several offenders are on the available evidence so related, whether in time or by other factors, that the interests of justice are best served by their being tried together, then they can properly be the subject of counts in one indictment and can, subject always to the discretion of the court, be tried together. Such a rule, of course, includes cases where there is evidence that several offenders acted in concert but is not limited to such cases."

This case has no application because in England joinder of offences or offenders is a "matter of practice in which the court has, unless restrained by statute, inherent power both to formulate its own rules and to vary them in the light of current experience and the needs of justice" — *per* Sachs J. In this country, such matters are regulated by the Criminal Procedure Code. And "when the legislature has specified the various groups of persons who can be tried together, it means that no other group can be tried together. . . . Each group consists of persons who are connected with each other in some way. To be tried together they must be connected in one of the ways described in the clauses" — see *Sohoni* Code of Criminal Procedure, 15th ed. vol. 2 p. 1385.

In the following Indian cases, namely, *Shakur* v. *Emperor* [4] and *Mst. Guljania* v. *Emperor,*[5] it was held that where several articles of theft were stolen at one theft, and were received by different persons at different times, all or any of such receivers are triable jointly for the offence of receiving stolen property. Here again, the joinder was authorized by a provision of the Indian Criminal Procedure Code section 239, clause (f). This clause provides for joinder of persons accused of offences under sections 411 and 414 of the Indian Penal Code or either of such sections in respect of stolen property, the possession whereof has been transferred by one offence. This clause has no counterpart in Criminal Procedure Code. Joinder of persons is in our Code regulated by section 179. It says that persons can be charged and tried together when they are accused of different offences committed in the course of the same transaction. This corresponds to clause (d) of the old section 239 of the Indian Criminal Procedure Code before its amendment to include clause (f). So cases turning on the construction of the words "committed in the course of the same transaction" in the old section of the Indian Criminal Procedure Code would be relevant to the instant case.

In the case of *Abdul Majid* v. *Emperor,*[6] the accused Abdul Majid was tried together with four others under section 411 of the Indian Penal Code, each of the five being charged separately with retaining stolen property and each being charged in respect of a different object. There was evidence that the articles retained by the accused were stolen on one occasion. It was held that their joint trial was illegal. Harington J. said at page 1267:—

"It is one offence, if one person retains a stolen sari at one place, and quite a distinct offence, if another person retains a stolen mirror at another place; and I confess I find it difficult to see how separate retainers by separate persons of separate articles at different places could be in the course of the same transaction.

. . . . . .

It has been pressed in argument that, because the prisoners might have been jointly indicted for the robbery or might have been jointly indicted for dishonestly retaining the whole proceeds they cannot have been prejudiced by being jointly tried on separate charges for separate offences and therefore section 537 applies.

. . . . . .

I do not agree with the proposition that the petitioner cannot have been prejudiced, because he might have been tried jointly with other prisoners on another charge. Had he been tried jointly with the others on a charge of theft he might have been able to rebut the presumption to be drawn from recent possession of stolen property by showing that he was at some other place when the robbery was committed; had he been tried jointly with the other petitioners on a charge of retaining the whole of the stolen property on showing that there was no joint retainer, he might have claimed to be charged and tried separately, in which case he could have called the

other prisoners as witnesses, if he so desired."

The appeal is allowed. The conviction is quashed and the sentence set aside. The other accused, Bong Foo, has not appealed, but what I have decided would also apply to him. Therefore in exercise of my powers of revision I quash his conviction and set aside his sentence.

I order a retrial by another magistrate in respect of both.

Appeal allowed. Retrial ordered.

Solicitors: *Joseph & Son.*

JAGATHEESAN v. LINGGI PLANTATIONS LTD.

[O.C.J. (Gill J.) November 25, 1966]

[K.L. — Civil Suit No. 249 of 1963]

Land Laws — Agreement for sale of land — Sale not completed according to agreement — Whether deposit can be recovered — Whether penalty or liquidated damages.

Contracts — Deposit paid on agreement for sale — Agreement for sale not completed on completion date — Time essence of contract — Whether deposit can be recovered — Whether penalty or liquidated damages — Contracts (Malay States) Ordinance, 1950, ss. 65 & 75.

The defendants had agreed to sell certain lands for the sum of $3,775,000 to one AN. Karuthan Chettiar and the sum of $377,500 had been paid "by way of deposit and part payment" in accordance with the agreement. Karuthan Chettiar assigned the agreement to the plaintiff. The sale was to be completed within 90 days from the date of the agreement and time was of the essence of the contract. The plaintiff failed to complete the sale and the defendants gave notice that the agreement was at an end and that the deposit had been forfeited. The plaintiff brought an action to recover the whole or part of the deposit made on the ground that the forfeiture of the deposit was a penalty and therefore void and that the damages suffered by the defendants should be assessed.

Held: (1) where in a contract between vendor and purchaser a sum is deposited by the purchaser by way of guarantee or security for the performance of the contract of sale and time is of the essence of the contract, the purchaser, if he fails to complete the sale at the essential time, cannot recover the deposit if it bears a reasonable proportion to the purchase price and there is a stipulation in the contract as regards forfeiture;

(2) the deposit of 10% was reasonable in the case of contracts for the sale of land and therefore the plaintiff in this case was not entitled to its recovery.

Cases referred to:—

(1) *Wallis* v. *Smith* (1882), 21 Ch. D. 243, 258.

(2) *Howe* v. *Smith* (1884), 27 Ch. D. 89.

(3) *Mussen* v. *Van Diemen's Land Co.* [1938] 1 All E.R. 210.

(4) *Stockloser* v. *Johnson* [1954] 1 All E.R. 630.

(5) *Tay Say Geok* v. *H.G. Warren* [1963] M.L.J. 179.

(6) *H.G. Warren* v. *Tay Say Geok & Ors.* [1965] 1 M.L.J. 44.

(7) *Natesa Aiyar* v. *Appavu Padayachi* A.I.R. 1915 Mad. 896.

(8) *Manian Pattar* v. *Madras Railway Company* (1906), I.L.R. 29 Mad. 118.

(9) *S.S. Maniam* v. *State of Perak* [1957] M.L.J. 75.

(10) *In re Dagenham (Thames) Dock Co., Ex parte Hulse* (1873), 8 Ch. D. 1022.

CIVIL SUIT.

Ng Ek Teong (*Abdul Rahim Nor* with him) for the plaintiff.

D. G. Rawson for the respondent.

Cur. Adv. Vult.

Gill J.: This action arises out of an agreement dated the 25th day of May, 1962, whereby the defendants agreed to sell certain lands for a sum of $3,775,000 to AN. Karuthan Chettiar, who, by a Deed of Assignment dated the 17th day of July, 1962, assigned the agreement absolutely to the plaintiff. Prior to the execution of the agreement the defendants had received from the purchaser a sum of $377,500 "by way of deposit and part payment", as stated in clause 1 of the agreement.

Clause 3 of the agreement provided that the purchase shall be completed on or before the expiry of 90 days from the date of the agreement. Clause 5 of the agreement stated as follows:—

> "If due to any act or default of the purchaser the said purchase shall not be completed as herein provided the vendor shall be entitled by notice in writing to the purchaser to declare this agreement at an end and thereupon this agreement shall cease to be of any force or effect and the sum of $377,500 (dollars three hundred and seventy-seven thousand five hundred) referred to in clause 1 hereof shall be forfeited to the vendor to account of damages for breach of contract."

The plaintiff's solicitors by their letter dated 19th July, 1962 gave notice to the defendants' solicitors of the assignment and enclosed a copy of the deed of assignment for inspection and return. The defendants' solicitors returned the deed of assignment to the plaintiff's solicitors with their letter dated 26th July, 1962 in which they drew attention to the date of completion of the sale. On 27th July, 1962 the plaintiff's solicitors wrote to the defendants' solicitors to ask for an extension of the period of completion by a further period of 90 days. The defendants' solicitors replied by their letter dated 1st August, 1962 to say that their clients were not prepared to consent to any extension of time. On 27th August, 1962 the defendants' solicitors wrote to the plaintiff's solicitors giving notice on behalf of their clients that the agreement was at an end and that the sum of $377,500, being the deposit paid, was forfeited to account of damages for breach of contract. They further stated that their clients reserved to themselves any right of action arising out of the breach of the agreement.

It is common ground that time was of the essence of the contract and that, as the plaintiff had committed a breach of the agreement by